Dayton Hudson Department Store Company, a Division of Dayton Hudson Corporation *and* International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, AFL–CIO. Case 7–CA–31476

May 15, 1991

DECISION AND ORDER

BY MEMBERS DEVANEY, OVIATT, AND RAUDABAUGH

On March 6, 1991, the General Counsel of the National Labor Relations Board issued a complaint alleging that the Respondent has violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing the Union's request to bargain following the Union's certification in Case 7–RC–19227. (Official notice is taken of the ''record'' in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer admitting in part and denying in part the allegations in the complaint.

On April 15, 1991, the General Counsel filed a motion to strike portions of the Respondent's answer and for summary judgment. On April 18, 1991, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. On May 1, 1991, the Respondent filed a Response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

In its answer and response to the Notice to Show Cause the Respondent admits its refusal to bargain, but attacks the validity of the certification on the basis of its objections to the election in the representation proceeding.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). Accordingly, we grant the Motion for Summary Judgment.[1]

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a Minnesota corporation with its principal office and place of business in Southfield, Michigan, is engaged in the operation of retail stores. The Respondent maintains various stores in the State of Michigan, including a store located at 35000 West Warren, in the city of Westland, Michigan. During calendar year 1990, a representative period, the Respondent, in the course and conduct of its business operations, had gross revenues in excess of $1 million, and purchased and caused to be delivered at its Michigan facilities, clothing, furniture, household electronics, and other goods and materials valued in excess of $55,000, of which goods and materials valued in excess of $50,000 were transported and delivered to its facilities in the State of Michigan, directly from points located outside the State of Michigan. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Certification*

Following the election held May 11, 1990, the Union was certified on December 26, 1990, as the collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time selling and non-selling employees, including employees of leased departments, except employees of Glemby International Michigan, Inc., employed at the Employer's facility located at 35000 West Warren, Westland, Michigan; but excluding confidential employees, employees of Glemby International Michigan, Inc., guards and supervisors as defined in the Act.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

B. *Refusal to Bargain*

Since on or about January 24, 1991, the Union has requested the Respondent to bargain and, since on or about January 31, 1991, the Respondent has refused. We find that this refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

[1] We, however, deny the General Counsel's motion to strike portions of the Respondent's answer. Given that this is the initial test-of-certification proceeding, the Respondent's denials that the Union's certification was proper and that the Respondent violated the Act by refusing to bargain, while erroneous, are not frivolous or a sham. See *Mattie C. Hall Health Care Center*, 280 NLRB 1114 fn. 1 (1986).

CONCLUSION OF LAW

By refusing on and after January 31, 1991, to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, Dayton Hudson Department Store Company, a Division of Dayton Hudson Corporation, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, AFL–CIO, as the exclusive bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment, and if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time selling and non-selling employees, including employees of leased departments, except employees of Glemby International Michigan, Inc., employed at the Employer's facility located at 35000 West Warren, Westland, Michigan; but excluding confidential employees, employees of Glemby International Michigan, Inc., guards and supervisors as defined in the Act.

(b) Post at its facility in Westland, Michigan, copies of the attached notice marked ''Appendix.''[2] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[2] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, AFL–CIO as the exclusive representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

> All full-time and regular part-time selling and non-selling employees, including employees of leased departments, except employees of Glemby International Michigan, Inc., employed at the Employer's facility located at 35000 West Warren, Westland, Michigan; but excluding confidential employees, employees of Glemby International Michigan, Inc., guards and supervisors as defined in the Act.

DAYTON HUDSON DEPARTMENT STORE COMPANY, A DIVISION OF DAYTON HUDSON CORPORATION